No. 89-1025

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

DENNIS ENGLAND, STANLEY NIELSEN,
MARLENE ENGLAND and JAN NIELSEN,
Petitioners,

v.

RICHARD HENDRICKS and FERRIS GROLL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS

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January 25, 1990

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42 U.S.C.A. §1983 (1981)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

U.C.A. §76-2-202 (1978)

Criminal responsibility for direct commission of offense or for conduct of another.--Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

U.C.A. §76-10-1206 (1978)

Dealing in harmful material to a minor.--(1) A person is guilty of dealing in harmful material when, knowing that a person is a minor, or having failed to exercise reasonable care in ascertaining the proper age of a minor, he:

(a) Knowingly distributes or offers to distribute, exhibits or offers to exhibit, any harmful material to a minor; . . .

U.C.A. §76-10-1201 (1978)

Definitions.--For purposes of this part: . . . (4) "Knowingly" means an awareness, whether actual or constructive, of the character of material or of a performance. A person has constructive knowledge if a reasonable inspection or observation under the circumstances would have disclosed the nature of the subject matter and if a failure to inspect or observe is either for the purpose of avoiding the disclosure or is criminally negligent.

STATEMENT OF THE CASE

The following facts are necessary to correct inaccuracies and omissions in the Petition for Certiorari. Petitioners' frequent conclusory statements without any citation to the record makes response difficult, because it is not clear to which part of the record they refer. Where this occurs, respondents' response lacks specificity being unavoidably limited by the vagueness of the assertion.

1. On page 4, petitioners allege that the officers "signed (and authorized) second degree felony Informations against the husband petitioners, charging them jointly with two felony counts of knowingly distributing harmful, (R-rated) videos to a minor and failing to exercise reasonable care to ascertain the minor's age." This is incomplete. While it is

true that the owners were charged under Utah's statute prohibiting the distribution of harmful material to minors, the county attorney, not the officers, made the decision, and authorized and prepared the Information. The basis for charging the store owners was Utah's Aiding and Abetting or "Criminal Responsibility for...Conduct of Another" Statute. (Tr. at 84, 517, 522-6, 531-5).

2. On page 5, petitioners claim they were branded as "alleged porno dealers" in a "publicity blitz". The officers did not use "pornography" or a derivative word in a public statement. Officer Hendricks made no public statement. (Tr. at 158-9). Officer Groll was not questioned about the media or public statements.

3. On page 5, petitioners state the evidence showed that the subject videos "were not X-Rated or pornographic." This

is irrelevant and inaccurate. It is irrelevant because pornography is not an element of the offense. Petitioners stipulated at trial that the tapes were harmful to minors. It is inaccurate because petitioner England testified that the last two of four videos rented were X-Rated and the rating was changed to "R". (Tr. at 351, 363). According to the police department and the county attorney, the first video was possibly pornographic. (Tr. at 186, 513).

4. On page 5, petitioners allege that the Tenth Circuit improperly found that the videos were "pornographic." The Tenth Circuit made no such finding. The Tenth Circuit used the words "allegedly pornographic tapes." 880 F.2d at 282.

5. On page 7, petitioners claim "respondents never appealed from the summary judgment order denying immunity."

Respondents made a timely appeal after final judgment was entered. Petitioners raised no issue of timeliness before the Tenth Circuit.

6. On page 7, petitioners claim "windfalls for the plaintiffs" and a "flood of incriminating admissions by Chief Groll, Officer Hendricks, and Prosecutor Gunnel." There is no citation to the record and it is impossible to know to what they refer. There were no incriminating admissions made by Chief Groll, Officer Hendricks or Prosecutor Gunnel. At trial, petitioners claimed Officer Hendricks lied about seeing Nielsen pass the tapes. There is no evidence of this. Officer Hendricks saw the girls approach Nielsen with the tapes. He did not see them purchase the tapes. (Tr. at 44-7). He relied on his knowledge that the girls approached an owner

(Hendricks knew it was an owner because he saw the owners meet earlier with the county attorney), the girls description of who sold the tapes, and confirmation of the description by Officer Wright and Dennis England. (Tr. at 53-4, 82, 124-5, 314).

7. On page 8, petitioners claim the State Director of Police Officers Standards "proved" that the officers "admitted acts and practices grossly violated the training standards." The officers called Clyde Palmer, Director of Utah Peace Officers Standards and Training. On cross examination, he admitted that an officer who lies is unethical, but he said that based on his review of the case, the officers acted reasonably in consulting the county attorney, in making their identification, and there was no arrest. (Tr. at 444,

448-9, 451). The owners called no experts.

8. On page 8, petitioners claim the jury found "the facial appearance of probable cause on the Information was supplied by grossly perjured statements of Hendricks." The jury made no finding of perjury. The jury rendered a general verdict. (See General Verdict, District Court, Docket Entry No. 56). Again, it is impossible to know exactly to what petitioners refer. However, if petitioners mean that Hendrick's signing of the criminal Information as the complaining witness was perjurious, they are wrong. The complaining witness does not have to be an eyewitness, but may simply allege "on information and belief", as stated on the face of the Information. (Trial Exhibits 4 and 6; Tr. at 520).

9. On page 8, petitioners allege that

"Chief Groll openly and defiantly claimed the right to apply vicarious felony liability theories to the non-resident shop owners, but not to the other resident or corporate owners whose clerks were caught in the same operation." This is vague and inaccurate. There is no issue of residency. Both petitioners were residents of Utah. They resided outside the county where they did business, but this is irrelevant. Chief Groll understood the difference between vicarious liability of an owner and criminal liability for the conduct of another which requires more than ownership. (Tr. at 175).

10. On page 8, petitioners claim the officers charged them with direct distribution and not aiding and abetting. First, the county attorney, not the officers, prepared the Amended Information

and charged the owners. (Tr. at 83-4, 524-5). Second, under the statute, an aider and abettor is charged as a principal. The statute says: "Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct." Utah Code Ann. §76-2-202 (1978) (emphasis added).

11. On page 8-9, petitioners claim admissions by Officer Groll "that there was a publicity campaign motive." No admissions are in the record. Chief Groll did not even testify about publicity.

12. On page 9, petitioners claim the publicity surrounding the arrest "permanently ruined the husbands' and

wives' video business in the community." There was substantial evidence that market changes, change in store location, and other business factors caused decline of the business. (Tr. at 475-497).

13. On page 9, petitioners refer to "surprise admissions and other conclusive and substantial evidence of a local police state as constitutionally corrupt and discriminatory in its own way as those local enforcement systems that gave rise to the Civil Rights Act." This interpretation of the evidence is unfounded.

14. On page 9, petitioners claim that Officer Groll "defiantly refused to accept Judge Winder's instructions on basic law of probable cause evidence and prohibited vicarious felony liability." This is false. During the exchange between the trial judge and Officer Groll, to which the owners are referring, Officer Groll

made the following statement:

> Without prejudice, I have not been in a courtroom where the defendants have been treated with as much bias by the court, your Honor. And I feel that in this case and I intend to write you a letter when we get through. I feel that there have been times when you have made statements about my conduct, the county attorney's conduct, and whether I'm intelligent enough to be a police officer. That is biasing the jury's opinions of me, and quite frankly, the tears shed here by the plaintiffs are not nearly as much as my wife's because of my reputation here alleged by this suit.
>
> And now, to answer your question, sir. I respectfully sit here and listened to the county attorney, I have read the statute and I will have to think a long time to change my thinking about who can aid and abet in violating the law. I'm sorry, I should be standing up. And I will have to consider that quite strongly, but you don't need to dress me down in this courtroom. I am not a rookie police officer. I've been one for 24 years, and I have been a chief of police for 7 years.

(Tr. at 541-2).

15. On page 10, petitioners state that

the officers appealed on the "grounds that they were immune as a matter of law." This is true as far as it goes. However, the officers also argued:

a. The officers were immune as a matter of law because they did not violate clearly established law.

b. The officers were immune because they consulted with and relied on the county attorney.

c. There was no constitutional violation. Petitioners alleged arrest in their complaint, but abandoned false arrest, claiming only that they were prosecuted without probable cause. (Brief of Appellees, May 28, 1987, at p.10). The county attorney, not the officers, prosecuted them.

d. The district court committed reversible error in ruling on the evidence and instructing the jury. The specific

instructions and rulings cited were as follows:

(1) The court erred in failing to instruct the jury that the officers were immune if they relied on the county attorney.

(2) The court erred in failing to instruct that the owners must prove arrest without probable cause, or, in the alternative, malice on the part of the police officers.

(3) The court refused to give an instruction defining "knowingly" as found in Utah Code Ann. §76-10-1201(4) (1978), and stated in front of the jury that it saw no evidence that the owners had committed a crime.

(4) The court erred in failing to exclude evidence of lost profits, or, in the alternative, should have instructed that truth is a defense.

(5) The court failed to instruct the jury regarding the duty of a video store owner under Utah law.

(6) The court erred when it did not allow the jury to view the video tapes as evidence of the degree of criminal negligence or recklessness of the owners.

16. On pages 11-16, petitioners attempt to characterize the Tenth Circuit's decision. The decision speaks for itself.

17. On page 15, petitioners allege that Eastwood v. Department of Corrections of Oklahoma, 846 F.2d 627 (10th Cir. 1988), "counters the Tenth Circuit conclusions" regarding "what Utah law prescribes in terms of vicarious liability." Eastwood contains no discussion of Utah vicarious liability law.

18. The statement of facts also contains erroneous arguments of law. These are analyzed below.

ARGUMENT

I. QUALIFIED IMMUNITY IS NOT WAIVED BY GOING TO TRIAL

Petitioners waived the argument that failure to appeal a summary judgment order denying qualified immunity constitutes waiver of the defense, because they did not raise it at trial or on appeal. This is the first time petitioners raise it. The Court of Appeals raised the issue in oral argument, but there is no indication that the Court considered it. The Court of Appeals' opinion makes no mention of it. Therefore, the issue of waiver is not properly before this Court. Adickes v. S.H. Kress & Company, 398 U.S. 144, 148; 90 S.Ct. 1598, 1602-3, n.1 (1970); Lawn v. United States, 355 U.S. 339, 362-3; 78 S.Ct. 311, 324, n.16 (1958).

In addition, petitioners' argument finds no support in Mitchell v. Forsyth, 472

U.S. 511; 105 S.Ct. 2806 (1985), or any other decision. Mitchell simply ruled that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C.A. §1291 notwithstanding the absence of a final judgment." 472 U.S. at 530. In support of this ruling, the Supreme Court noted that qualified immunity is "an immunity from suit rather than a mere defense to liability." Id. at 527. So understood, a pre-trial denial of absolute immunity must be considered an appealable interlocutory order because a right to immunity from suit is "effectively" lost "if a case is erroneously permitted to go to trial." Id. at 527.

Petitioners' interpretations of the foregoing excerpts from Mitchell are

fatally flawed in two respects. First, the scope of an official's qualified immunity under Mitchell is not limited to "an entitlement not to stand trial," but also includes an immunity from damages. Lovell v. One Bancorp, 878 F.2d 10, 12 (1st Cir. 1989); McIntosh v. Weinberger, 810 F.2d 1411, 1431 n.7 (8th Cir. 1987), vacated on other grounds, Turner v. McIntosh, 487 U.S. _____; 108 S. Ct. 2861 (1988) (qualified immunity under Mitchell also envisions protecting public officials from being subjected to monetary liability). Therefore, qualified immunity continues to protect public officials even after the case goes to trial. Second, petitioners confuse the Mitchell Court's concern for shielding government officials from the costs and burdens of trial with the substantive issue of waiver of a qualified immunity defense. Contrary to

petitioners' view, the analysis in Mitchell went only to the issue of the appealability of a pre-trial order denying qualified immunity under the collateral-order rule set forth in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541; 69 S.Ct. 1221 (1949). Mitchell makes no mention whatever of any rule of waiver of qualified immunity for failure to appeal a summary judgment order denying the same defense. As a general rule, a defendant waives the affirmative defense of qualified immunity only upon failure to present the defense before the court in a proper and timely manner. See Walsh v. Mellas, 837 F.2d 789, 799 (7th Cir.), cert. denied, 108 S.Ct. 2832 (1988), citing Harlow v. Fitzgerald, 457 U.S. 800, 815; 102 S.Ct. 2727, 2736 (1982). Respondents' assertion of qualified immunity in a Motion for Summary Judgment

and a Motion for Directed Verdict essentially negated any possibility of waiver in this case.

Finally, circuit cases expressly reject the same waiver argument relied upon by petitioners. In McIntosh, the Eighth Circuit Court of Appeals dismissed the plaintiffs' suggestion that the defendant "surrendered his qualified immunity defense by failing to appeal immediately the District Court's denial of summary judgment on this ground." 810 F.2d 1411, 1431 n. 7 (8th Cir. 1987), vacated on other grounds, Turner. The McIntosh Court explained,

> Mitchell did, as plaintiffs emphasize, recognize that the rejection of a qualified-immunity summary-judgment motion is an appealable final order under 28 U.S.C. §1291 and the collateral-order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), reasoning that qualified immunity is due in part to concern over the cost to effective

> government of requiring public officials to stand trial, 105 S. Ct. at 2815, a concern that is moot where the trial is already completed. Yet, Mitchell clearly recognizes that qualified immunity is also concerned with protecting public officials from being subjected to monetary liability for their official actions, and this concern of course remains substantial even where trial has gone forward. See Mitchell, 105 S. Ct. at 2815, citing Harlow v. Fitzgerald, 457 U.S. at 816, 102 S.Ct. at 2737. Hence we conclude that, as is generally the case for appealable interlocutory orders, see Scarrella v. Midwest Federal Savings & Loan, 536 F.2d 1207, 1209 (8th Cir.), cert. denied, 97 S.Ct. 237, 50 L.Ed.2d 166, 429 U.S. 885 (1976); 9 Moore's Federal Practice, para. 110.18 (1986), failure immediately to appeal the rejection of a qualified-immunity defense does not bar raising it on appeal after trial.

Id. (emphasis added). Additionally, the First Circuit Court of Appeals noted in Kaiter v. Town of Boxford, 836 F.2d 704, 708 n.3 (1st Cir. 1988), that a defendant retains the right to challenge any pre-

judgment rulings relative to immunity, whether absolute or qualified, "in an appeal from a final judgment." See also Noe v. Stockwell, 630 F.Supp. 334, 336-7 (E.D. Tex 1986) (fact that case went to trial precluded an interlocutory appeal under Mitchell, but defendant's qualified immunity defense was still viable at trial and upon appeal).

Petitioners claim on page 20 that a "critical reason" for granting Certiorari is that the Tenth Circuit will "misconstrue conclusive facts and alter clearly established law to support clearly unconstitutional local police action." (Petition at p. 20). This claim of diabolical motive is unfounded.

II. THE STANDARD OF REVIEW IN THIS CASE IS DE NOVO

According to petitioners' argument, the fact that the subject case went to trial

precludes de novo review of qualified immunity issues. Petitioners contend that Eastwood, where the Tenth Circuit adopted Mitchell and reviewed de novo an appeal from a district court's denial of defendant's motion to dismiss on qualified immunity grounds, 846 F.2d at 628, is inapplicable to the case at bar in absence of an interlocutory appeal of qualified immunity.

Petitioners, however, fail to provide the Court with any case law limiting de novo scrutiny to appellate review of interlocutory orders concerning qualified immunity. Moreover, the Mitchell decision never makes any distinction between de novo appellate review of interlocutory orders and final judgments, implying that all appealable issues of qualified immunity are "purely legal question[s]." 472 U.S. 511, 530 (1985). Thus, the Tenth

Circuit's application of Eastwood and Mitchell's de novo standard of review to the purely legal question of respondent Hendrick's qualified immunity in no way exceeds the Seventh Amendment's ban on appellate review of factual issues tried by a jury. See Rakovich v. Wade, 850 F.2d 1180, 1201-1202 (7th Cir.), cert. denied, 109 S.Ct. 497 (1988) (jury's role does not extend to determination of immunity because the issue of qualified immunity is a legal question for the trial court, not the jury); McIntosh, 810 F.2d at 1411 (standard of review was de novo even though defendant had not appealed pre-trial order denying qualified immunity).

The petitioners' citation of Denver & Rio Grande Western Railroad Co. v. Conley, 293 F.2d 612 (10th Cir. 1961), on this issue is inapposite. This case simply stands for the proposition that an

appellate court may overturn a jury verdict regarding factual matters only "when there is a complete absence of probative facts." 293 F.2d at 613. Because the issue of defendant Hendrick's qualified immunity is a "purely legal question," Mitchell, 472 U.S. at 530; 105 S.Ct. at 2817, Denver & Rio Grande is irrelevant to the case at hand.

Finally, petitioners' discussion of an "inflammatory finding of 'allegedly pornographic video'" and "judicial libeling" (Petition at p. 23, 25) is inaccurate and irrelevant. See paragraphs 2 and 3 of the Statement of the Case above.

III. THE OFFICERS ARE QUALIFIEDLY IMMUNE ON THE BASIS THAT THEIR CONDUCT WAS OBJECTIVELY REASONABLE

In Harlow, this court held that where the applicable law is not clearly

established at the time the official's action occurred, the official is entitled to qualified immunity under 42 U.S.C. §1983. Id. at 818. The law at issue in the present case was the Utah statute prohibiting distribution or dealing in harmful materials to minors. This law states:

> A person is guilty of dealing in harmful material when, knowing that a person is a minor or having failed to exercise reasonable care in ascertaining the proper age of a minor, he:
> (a) knowingly distributes or offers to distribute, exhibits or offers to exhibit any harmful materials to a minor . . ..

Utah Code Ann. §76-10-1206 (1978).

The petitioners were charged with aiding and abetting in the violation of this statute. Utah Code §76-2-202 provides that a person may be convicted as an aider and abettor if that person acts,

> ... with the mental state required for the commission of an offense [and] solicits,

> requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense.

At the time of the officers' actions, there were no relevant Utah Supreme Court cases interpreting the Harmful Material to Minors Statute. The police officers consulted the county attorney. The officers told the county attorney that at least one owner was out-of-town when the video tapes were sold. The county attorney prepared Informations and charged both petitioners. Given the uncertainty of the law, and the county attorney's advice, a reasonable police officer could conclude his conduct was lawful. See Lavicky v. Burnett, 758 F.2d 468, 476 (10th Cir. 1985).

The cases petitioners cite have no application to this issue. State v. Comish, 560 P.2d 1134 (Utah 1977), simply interprets the Utah statute for "aiding

and abetting" in the context of a sale of illegal drugs, shedding no light whatsoever on how the "aiding and abetting" statute should be interpreted with regards to "knowingly distributing harmful materials to minors" under Utah Code §76-10-1206. Other cases cited by the petitioners have nothing to do with the crime of "knowingly distributing harmful materials to minors" under Utah Code §76-10-1206. See State v. Blue, 53 P. 978 (Utah 1898) (embezzlement); State v. Allen, 189 P. 84 (Utah 1920) (larceny); State v. Stenback, 2 P.2d 1050 (Utah 1931) (homicide); or State v. Leek, 39 P.2d 1091 (Utah 1934) (forgery).

Petitioners argue on page 31 that this case constitutes "implementation of local totalitarian police states with Circuit Court sanction." Circuit and police bashing, found in this and other places in

the Petition, is inappropriate and unfounded.

Finally, on pages 28-30, petitioners' quote portions of pages 540-544 of the Court record. A complete copy of this portion of the trial record is attached to the Appendix. Reliance on this part of the trial record is misplaced. The District Judge engaged in extrajudicial activity and called Chief Groll to repentance during the trial. The Judge's comments are not a basis for granting Certiorari. They are evidence of prejudicial statements against the officers which issue they raised on appeal.

IV. THE ISSUE OF PUNITIVE DAMAGES IS NOT PROPERLY BEFORE THE COURT

Petitioners maintain the District Court "abused its discretion" in vacating the attorneys fees award, dismissing claims of the wives for lack of standing, and deny-

ing the issue of punitive damages. However, petitioners do not argue these as a basis for granting Certiorari, and respondents will not address them in this Opposition to Certiorari. Procedurally, however, the petitioners never raised the issue of punitive damages at the trial of this matter, did not submit any jury instructions except for a directed verdict, and did not object to the instructions given. (Tr. at 553, 640-41; District Court Minute Entry, November 3, 1986.) Hence, the issue was never properly raised before the Court of Appeals. It is well established that the Supreme Court will not consider issues not properly raised or preserved below. Adickes v. S.H. Kress & Company, 398 U.S. 144, 148; 90 S.Ct. 1598, 1602-3, n.1 (1970); Lawn v. United States, 355 U.S. 339, 362-3; 78 S.Ct. 311, 324, n.16 (1958).

CONCLUSION

For the reasons set forth above, the respondents herein submit that a Writ of Certiorari should not be granted in this case.

Respectfully submitted,

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January 25, 1990

APPENDIX A

THE COURT: WELL, YOU GO AHEAD AND MAKE IT, BUT THE SAME THING APPLIES. THERE IS NO WAY AFTER BEING HERE FOR THIS LENGTH OF TIME THAT--I WILL TELL YOU THIS, AND SIT DOWN A MINUTE. I HAVE THOUGHT ABOUT DIRECTING A VERDICT AT LEAST AGAINST CHIEF GROLL BECAUSE CHIEF GROLL, LIKE THE COUNTY ATTORNEY HERE, TESTIFIED THAT HE THOUGHT THEN AND STILL THINKS THAT AN OWNER CAN BE CHARGED UNDER THIS STATUTE SIMPLY BECAUSE HE'S AN OWNER, IN WHICH IT IS INCREDIBLE TO ME, BUT THAT IS NOT THE LAW. MOST EMPHATICALLY, AS I HAVE ALREADY DISCUSSED, THERE JUST ISN'T ANY DOUBT ABOUT THAT. BUT I'M NOT GOING TO DIRECT A VERDICT AGAINST HIM. I'M GOING TO SUBMIT IT TO THE JURY.

I THINK THERE IS DEFINITELY A JURY ISSUE AS FAR AS MR. HENDRICKS, BUT MR. GROLL IN HIS TESTIMONY DIDN'T SEEM TO RELY ON THE COUNTY ATTORNEY. HE APPARENTLY

HASN'T EVEN LEARNED FROM THESE PROCEEDINGS, AND YOU DON'T CHARGE PEOPLE WITH FELONIES BASED ON VICARIOUS LIABILITY, CHIEF GROLL. I MEAN, PEOPLE TO BE VIOLATING THE CRIMINAL LAWS HAVE GOT TO THEMSELVES PERSONALLY WITH INTENT BE INVOLVED IN THE ELEMENTS OF THE CRIME. DO YOU UNDERSTAND THAT NOW?

MR. GROLL: YOUR HONOR, ARE YOU ALLOWING ME TO SPEAK TO YOU?

THE COURT: I CERTAINLY AM.

MR. GROLL: WITHOUT PREJUDICE, I HAVE NOT BEEN IN A COURTROOM WHERE THE DEFENDANTS HAVE BEEN TREATED WITH AS MUCH BIAS BY THE COURT, YOUR HONOR. AND I FEEL THAT IN THIS CASE AND I INTEND TO WRITE YOU A LETTER WHEN WE GET THROUGH. I FEEL THAT THERE HAVE BEEN TIMES WHEN YOU HAVE MADE STATEMENTS ABOUT MY CONDUCT, THE COUNTY ATTORNEY'S CONDUCT AND WHETHER I'M INTELLIGENT ENOUGH TO BE A POLICE OFFICER.

THAT IS BIASING THE JURY'S OPINIONS OF ME, AND QUITE FRANKLY, THE TEARS SHED HERE BY THE PLAINTIFFS ARE NOT NEARLY AS MUCH AS MY WIFE'S BECAUSE OF MY REPUTATION HERE ALLEGED BY THIS SUIT.

AND NOW, TO ANSWER YOU QUESTION, SIR. I RESPECTFULLY SIT HERE AND LISTENED TO THE COUNTY ATTORNEY, I HAVE READ THE STATUTE AND I WILL HAVE TO THINK A LONG TIME TO CHANGE MY THINKING ABOUT WHO CAN AID AND ABET IN VIOLATING THE LAW. I'M SORRY, I SHOULD BE STANDING UP. AND I WILL HAVE TO CONSIDER THAT QUITE STRONGLY, BUT YOU DON'T NEED TO DRESS ME DOWN IN THIS COURTROOM. I AM NOT A ROOKIE POLICE OFFICER. I'VE BEEN ONE FOR 24 YEARS, AND I HAVE BEEN A CHIEF OF POLICE FOR 7 YEARS.

THE COURT: I UNDERSTAND.

MR. GROLL: AND I'M GOING THROUGH WITH AS MUCH CONCERN AS THESE PEOPLE AND THEIR WIVES ARE OVER MY REPUTATION AS A POLICE

CHIEF AND MY OFFICER'S REPUTATIONS. HE'S BEEN CALLED A LIAR. I HAVE BEEN CALLED INCOMPETENT. YOU'RE CALLING ME INCOMPETENT NOW.

THE COURT: I'M NOT CALLING YOU INCOMPETENT AT ALL.

MR. GROLL: YES, YOU ARE.

THE COURT: WHAT I'M SAYING, CHIEF GROLL, IS YOUR VIEW OF THE LAW IS WRONG AND THE CRIMINAL LAW BEFORE YOU CHARGE PEOPLE WITH FELONIES, THAT PERSON HAS GOT TO EITHER DO THE CRIME THEMSELVES OR THEY HAVE GOT TO PAY ANOTHER. AND YOUR VIEW, BY MY BEING PREJUDICE TO THE JURY, AND YOU'RE ENTITLED TO YOUR OWN VIEW AND I AM CERTAINLY NOT SENSITIVE ABOUT THESE THINGS AT ALL, BUT I HAVE A DUTY TO PRESIDE OVER THIS PROCEEDING AND CHANNEL THE THINKING OF THE JURY IN THE CORRECT WAY. AND THESE CASES ARE VERY DIFFICULT AND COMPLICATED AND IT'S VERY EASY FOR JURORS TO

MISAPPREHEND THE LAW. AND IT'S MY RESPONSIBILITY TO SEE THAT THEY HAVE A CLEAR VIEW OF THE LAW.

AND THE REASON THAT I HAVE MADE THE COMMENTS THAT I HAVE IN THIS CASE ARE BECAUSE I WANT THE JURY TO BE ADVISED CORRECTLY ABOUT WHAT THE LAW IS. AND THE MOST IMPORTANT THING IN ANY CRIMINAL STATUTE IS THAT THERE BE A UNION OF ACT AND INTENT. AND WHAT YOU FORGOT ABOUT TOTALLY IN THIS CASE IS THE REQUIREMENT OF INTENT. AND THERE HAS GOT TO BE INTENT ON THE PART OF THESE PEOPLE TO BE CHARGED WITH THE FELONY.

AND THE SAME IS TRUE WITH THE COUNTY ATTORNEY. YOU DON'T CHARGE PEOPLE IN UTAH WITH FELONIES IF THEY DIDN'T PARTICIPATE KNOWINGLY IN THE COMMISSION OF THE CRIME. AND THEY CERTAINLY DON'T NEED TO DO IT THEMSELVES, BUT NEED TO KNOW WHAT SOMEBODY ELSE IS DOING, AND THAT NEEDS TO BE DONE

AT THE SOLICITATION OR ENCOURAGEMENT. AND THERE SIMPLY ISN'T A SHRED OF EVIDENCE IN THIS CASE THAT MR. ENGLAND KNEW ANYTHING ABOUT WHAT WAS HAPPENING AT THE TIME THAT THIS WAS DONE, AND THAT'S WHY I HAVE SAID WHAT I HAVE DURING THE TRIAL.

MR. GROLL: I APPRECIATE YOU LETTING ME DISCUSS THAT WITH YOU.

THE COURT: THAT'S FINE.

MR. GROLL: AND I HAVE -- I FEEL JUST AS BAD ABOUT AND JUST A BIG RESPONSIBILITY TO THE CITIZENS OF THIS CITY WHEN COMPLAINTS ARE BROUGHT TO ME AND CONCERNED ABOUT THE COMPLAINT ISSUE FROM MY OFFICE. AND I FELT AS MUCH REMORSE, PERSONALLY, FOR ME BECAUSE A $1 MILLION SUIT HAS BEEN SUED AGAINST ME BECAUSE THEY HAVE -- BECAUSE THEY HAVE BEEN CHARGED. AND I DON'T THINK IT'S ANY MORE FAIR TO BRING ME DOWN HERE AND PUT ME THROUGH THIS, THAN IT WAS FOR THEM.

THANK YOU, YOUR HONOR.

THE COURT: STAND UP AND LET ME TALK WITH YOU JUST A MINUTE MORE, CHIEF GROLL.

AS FAR AS WHAT OCCURRED BACK THERE, ANYBODY CAN MAKE A MISTAKE, BUT THE REASONS THAT I MADE THE COMMENTS I DID TO GET IN HERE, IT SEEMS TO ME WITH ALL DUE RESPECT, THAT YOU WOULD LEARN SOMETHING FROM THIS SUIT ABOUT THE CRIMINAL LAW. AND THE REASON I SAID WHAT I DID IS I HEARD YOU ON THE STAND YESTERDAY AND YOU SAID THAT YOU STILL BELIEVE THAT AN OWNER CAN BE CHARGED WITH THE FELONY BECAUSE THEY ARE AN OWNER. AND THAT IS SIMPLY WRONG.

AND IN YOUR CAPACITY AS CHIEF OF POLICE, AND IF YOU BELIEVE THAT YOU CAN CHARGE PEOPLE WITH FELONIES WHEN THEY DIDN'T INVOLVE THEMSELVES PERSONALLY IN THE INCIDENT, THAT IS WHAT CONCERNED ME. I'M NOT THE LEAST BIT CONCERNED ABOUT MR.

HENDRICKS BECAUSE I DON'T KNOW WHETHER HE MADE A MISTAKE OR DIDN'T MAKE A MISTAKE. BUT YOU APPARENTLY STILL HAVE THAT SAME VIEW, AND THAT'S WHAT I'M CONCERNED ABOUT.

WE WILL BE IN RECESS UNTIL 9:15.